

FEIN & FEIN

910 SEVENTEENTH STREET, N.W. SUITE 800
WASHINGTON, D.C. 20006

TELEPHONE: 202-775-1776
FACSIMILE: 202-478-1664
WWW.FEINANDFEIN.COM

February 12, 2003

EX PARTE

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street SW, Suite TW-8B201
Washington, D.C. 20554

RE: In the matter of Appropriate Framework for Broadband
Access to the Internet Over Wireline Facilities, CC
Docket Nos. 95-20, 98-10, and 02-33

In the matter of Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange Carriers, CC
Docket Nos. 01-338, 96-98, and 98-147

Dear Mr. Chairman:

I am writing as former general counsel of the Federal
Communications Commission and contributing editor of Tech
Central Station.

Candor and full disclosure concerning material facts are
essential in the above-referenced rulemaking proceedings. The
Commission's unbundling decisions will be pivotal to the
evolution of the telecommunications industry and the financial
health of rival companies. The rulemakings resemble
adjudication in their targeted and potentially devastating
impacts on relatively few parties and the necessity of reliable
factfinding about facilities investment plans of incumbent local
exchange carriers (ILECs) in fixing their unbundling
obligations.

On that score, the following seems troubling. Official
notice can be taken of the Commission's objective, among others,
of promoting new fiber facilities featuring broadband services
in contemplating new unbundling rules. Official notice can also
be taken of the soundtrack-like arguments of ILECs that current
unbundling rules are dampening new fiber construction because

the upgrades and benefits would be shared with competitors. The Commission and participants in the above-referenced proceedings have been led to believe that a spurt in ILEC fiber investments would ensue if unbundling rules terminated in whole or in part. Thus, unbundling should be favored to trigger dazzling new fiber options for consumers.

The ILECs apparently lobbied 22 members of the House of Representatives to dispatch a letter to the F.C.C. echoing their case: "We cannot expect [the phone companies] to invest in and deploy new facilities when they are required to share such facilities with competitors at below-market prices. While access to broadband services over copper loops has increased over the past several years, such services pale in comparison to the types of capabilities that consumers could enjoy if fiber accounted for a greater portion of the so-called last-mile facilities."

Suspicion has been raised, however, that ILECs have withheld from the Commission plans for the foreseeable future to rely predominantly on copper wires with new technology to deliver broadband services in lieu of new fiber whether or not unbundling obligations continued.

A Washington Post story by Jonathan Krim ("Copper Lines Regaining Luster," Feb. 7, 2003, p. E1) (attached) provides persuasive evidence. At present, engineering tests in labs and on site are yielding Internet connection speeds over copper at five to 50 times as fast as broadband digital-subscriber-line service. William L. Smith, chief technology officer of BellSouth, enthused: "I'm amazed and encouraged with what we can do with our copper network. I still want to have fiber to every home and every business, but there's a lot we can do with copper."

Verizon has conducted engineering tests in which maximum DSL speeds climbed from 1.5 megabits per second to 7 megabits per second, without additional fiber. That would enable video services over copper.

Qwest for three years has offered a menu of television programming equivalent to cable packages to 50,000 customers using copper wires with a technology known as very-high-data-rate DSL. "Copper is far from dead," insisted Steve Starliper, vice president of consumer product management for Qwest.

Economic rationality would also seem to drive the ILECs to

copper with VDSL in lieu of fiber indefinitely. Expert John M. Cioffi at Stanford University elaborates: "[Fiber to the home] is just economically not viable. Even if the phone companies had the money, the labor is expensive. Realistically, fiber could be a century away." VDSL, he said, "is the only logical alternative."

Christopher T. Rice, senior vice president for network planning and engineering at SBC, asserted his company had decided that in the long run pulling fiber to the home was most cost-efficient. But he conceded that extensive stringing of fiber is at least ten years away.

Verizon's Peter Castleton, executive director of broadband products, declared no interest in upgrading incumbent DSL customers to faster speeds: "We're really focused on our existing DSL products to meet what customers are looking for now." And the CEO of Verizon recently voiced general disinterest in surging fiber investments.

The troubling question this chronicle raises is whether ILECs in the above-referenced proceedings dishonored an obligation of candor by non-disclosure of plans for predominate use of copper technology upgrades to provide broadband services with new fiber construction relegated to a diminutive role.

Title 47, § 1.17 of the Code of Federal Regulations prohibits "any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission," in addition to the Commission's customary requirement of complete candor. In the above-referenced proceedings, the material facts were the plans of ILECs to construct new fiber if freed from unbundling obligations as opposed to reliance on new copper technology to provide a menu of broadband services. Those facts remain material today.

Indeed, if material non-disclosures are established, then the culpable ILECs may have committed antitrust violations.

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, or conspiracies to monopolize. The ILECs all enjoy monopoly power in local exchange service with greater than 90 percent of the market. Such monopolists violate the Sherman Act by "willful maintenance" of that power, as contrasted with growth by superior skill. United States v. Grinnell Corp. (1966).

The Sherman Act also prohibits the manipulation or distortion of agency quasi-adjudicative decisions by deception or cognate sordidness to advance anti-competitive aims. California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Judge Robert H. Bork enumerated five factors determinative of liability for persons charged with illegal attempts to employ the coercive powers of government for wrongful ends in The Antitrust Paradox 357 (1993): "(1) the intent of the parties; (2) the means employed; (3) the character of the governmental process involved; (4) the character of the decision to be made; and, (5) the degree to which the process focuses upon the formulation of general rules or upon the rights and liabilities of particular parties."

In conjunction with the F.C.C. informal rulemaking proceedings addressing unbundling of local exchange and broadband, applying the Bork framework for antitrust liability indicates a substantial case against the ILECs. The suspected material non-disclosures aimed to end or halt unbundling to defeat competition from CLECs, a predatory objective. The means used were treacherous, i.e., deceiving Commissioners about prospective fiber investments compared with new copper technology to offer broadband services. The governmental process involved is informal agency rulemaking where reliable fact-finding about new facilities investments is critical. As Judge Bork explained, "As the governmental process of information gathering and decision making becomes more formalized (i.e., moves more toward the model of judicial decision making), the [First Amendment] immunity of the conspirators correspondingly begins to narrow." The Antitrust Paradox 359-60.

The character of the F.C.C. decision at stake--interpreting and implementing the unbundling standards of the 1996 Telecommunications Act--seems inconclusive on the issue of ILEC liability for deception. Judge Bork elaborates: "[W]hen the official, agency, or tribunal has circumscribed powers of decision, courts may invalidate actions that are outside the area of discretion and may impose liability on those who knowingly and wrongfully induce action that is beyond the power of the agency involved." Id. 361.

The ILECs attempted to induce F.C.C. action which might fall within its discretion. And the attempt largely failed. On the other hand, the Supreme Court signaled in its Otter Tail rulings that success in convincing government entities is not a condition of antitrust liability if the objective was predatory.

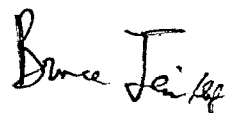
Antitrust immunity dwindles as the government action narrows its focus from the general to the specific. The unbundling proceedings of the F.C.C. specifically focus on ILECs and CLECs and are central to their competitive profiles and financial viability. The rulemakings are not directed at the public generally, but to specific industry participants. Moreover, written statements in an open record were submitted by interested parties with opportunities to respond and to visit with Commissioners. These factors give the rulemaking processes more the character of a judicial than a legislative decision; the need for truthful and candid statements are at their zenith in the former, and thus militates in favor of antitrust liability if the F.C.C. has been materially deceived in its unbundling proceedings.

Judge Bork concludes: "Predation through the misuse of governmental processes appears to be a common but little-noticed phenomenon. . . . In this area, antitrust can not only perform a valuable service to consumers but, as a by-product, can also contribute to the integrity and efficiency of administrative and judicial processes." The Antitrust Paradox 364.

Newspaper stories, of course, are no synonyms for proven facts. The Washington Post report on copper in contrast to fiber may contain errors or omissions. But the story cannot responsibly be ignored.

I urge the Commission to consider requesting the ILECs to disclose their short, medium, and long-term construction and technology strategies for offering broadband and local phone services if unbundling requirements are ended or withheld from new facilities. It would seem that such information should be received and digested before the Commission consider relaxing or withholding any unbundling obligations. The Commission may further wish to request the Department of Justice to initiate an antitrust investigation.

Sincerely,


Bruce Fein

(Attachment)

CC: Commissioner Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Office of the Secretary (via electronic filing)

washingtonpost.com

Copper Lines Regaining Luster

With the Obstacles to Fiber, Phone Companies Are Tapping the Old Infrastructure

By Jonathan Krim
Washington Post Staff Writer
Friday, February 7, 2003; Page E01

For years, replacing the nation's copper telephone wires with fiber-optic cable has offered a promise of digital heaven: quick downloading of full-length movies from the Internet; phone companies offering television programming to compete with cable; two-way, interactive video for online gaming, education and medicine.

But the regional telephone giants also have warned that as long as they are required to lease those fiber networks to competitors, they will be unwilling to spend significant sums to build them.

Now, with the Federal Communications Commission ready to revamp its competition rules in the next two weeks, many telephony experts, financial analysts and some phone company officials say that even if the former Bell telephone companies get the regulatory relief they seek, fiber to people's homes will remain a far-off dream.

Not only does stringing fiber to the home remain enormously expensive, but advances in technology allow significantly faster connection speeds to be squeezed out of the country's 1.5 billion miles of existing copper lines.

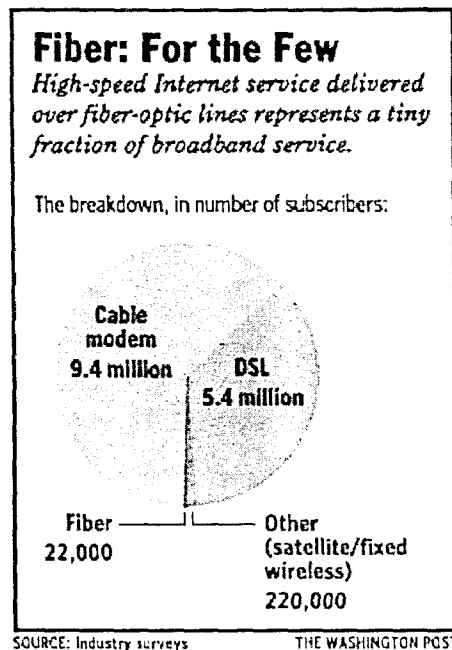
Tests in engineering labs and in a handful of areas around the country are yielding Internet connection speeds five to 50 times as fast as what is now considered "broadband" digital-subscriber-line service offered over phone lines.

"I'm amazed and encouraged with what we can do with our copper network," said William L. Smith, chief technology officer of BellSouth Corp., the regional phone company in the Southeast. "I still want to have fiber to every home and every business, but there's a lot we can do with copper."

Industry giant Verizon Communications Inc., the dominant local phone provider from Maine to Virginia, has run engineering tests in which DSL speeds were increased from a maximum of 1.5 megabits per second to 7 megabits per second, without additional fiber. That would more than enable the video applications that many technology companies say would make broadband more attractive to consumers and jump-start the struggling sector.

Qwest Communications International Inc., which primarily serves the Rocky Mountain region, has for three years served a handful of communities with a full menu of television programming, equivalent to cable packages, over its copper lines using a technology known as VDSL (very-high-data-rate DSL).

"Copper is far from dead," said Steve Starliper, vice president of consumer product management for Qwest, which has 50,000 VDSL customers in Colorado and Arizona.



Although deploying VDSL requires extending fiber lines deeper into neighborhoods, that has cost Qwest far less than it would have had it dug up people's yards or driveways to pull fiber into their houses.

But such advances have drawn little notice in the debate in Washington as the FCC nears decisions on a variety of regulations that will govern telephone and broadband competition.

The former Bells and their supporters continue to press the case that easing their obligations to lease lines to other phone companies would put them on equal footing to compete against cable firms -- and is the key to unlocking investment in a fiber future.

"We cannot expect [the phone companies] to invest in and deploy new facilities when they are required to share such facilities with competitors at below-market prices," said a recent letter to the FCC signed by 22 members of the House of Representatives who support the former Bell companies' position. "While access to broadband services transmitted over copper loops has increased over the past several years, such services pale in comparison to the types of capabilities that consumers could enjoy if fiber accounted for a greater portion of so-called last-mile facilities."

Critics of the former Bells fear that changing the rules would stifle competition for local telephone service and high-speed Internet access, all in the interest of fiber upgrades that the big regional companies have little intention of making.

Some Wall Street analysts say FCC regulations have little to do with why the former Bell companies are not making capital expenditures.

"Myth 1: RBOC [phone company] spending is down because of the current . . . regulatory environment" that discourages investment in upgrading their networks, wrote a team of telecommunications stock analysts at J.P. Morgan Chase & Co.

Instead, like most telecommunications companies, the former Bells binged on spending during the bubble years of the late 1990s, according to the analysts. They added that the companies' targets of

spending a collective \$19 billion this year is 10 percent less than what they spent in 1995, the year before Congress ordered their networks opened to competition.

Only when the phone companies' core economic picture improves will heavy investment resume, the analysts wrote.

FCC Chairman Michael K. Powell, who recently circulated proposed rules to the other four FCC commissioners, is seeking to ease requirements on the phone companies as part of his broad philosophy that the country needs to migrate to a digital platform.

"The phone companies are sitting on aging infrastructure," Powell said in a recent interview. "Copper wire will end its life."

Sources familiar with Powell's draft proposals say the rules would eliminate leasing obligations for fiber lines built to new residential or commercial developments, where there is no existing telephone service.

Less clear is what the FCC will decide in cases where fiber is driven deeper into neighborhoods before connecting with the copper wires that serve individual homes, or is strung to homes where copper service already exists.

The former Bells want any fiber upgrades to trigger regulatory relief, but sources say the commission is looking at maintaining some leasing obligations based on the extent of the upgrade. Under this scenario, the greater the upgrade to fiber, with corresponding increases in the speed of sending and receiving online transmissions, the lesser the sharing requirements would be.

Many telecommunications experts and industry executives agree that fiber to the home is broadband's Holy Grail, a "future-proof" technology that can offer speeds 100 times as fast as today's DSL and accommodate uses not even currently contemplated.

In the long run, pure fiber networks also are cheaper to operate and maintain than copper or fiber-copper marriages, because fewer switching terminals and other electronics are required. About 22,000 homes have fiber service.

But fiber to the home "is just economically not viable," said John M. Cioffi, a professor of engineering at Stanford University and one of the country's foremost experts on DSL technology. "Even if [the phone companies] had the money, the labor is exhaustive. Realistically, fiber could be a century away."

Cioffi contends that VDSL, a technology that has been around for years, is the only logical alternative. The challenge is to push fiber lines to within 3,000 to 4,000 feet of homes and then hook the copper wires from those houses into the fiber. In this way, Cioffi said, the cost of laying the fiber is shared by many customers. At that distance, speeds of 52 megabits per second are possible, Cioffi said, which is more than adequate for high-end video applications, including high-definition television.

In many cases, the fiber from the carrier's central facility to the neighborhood can be pulled through the same conduits that carry existing phone lines, minimizing additional trenching costs and disruption.

What VDSL provides is what many analysts say is an essential "triple play" of services for the phone companies: telephone, Internet and television programming. Otherwise, analysts say, cable firms -- which already provide Internet and television services -- will add telephone service and leave the former Bells in the dust.

The other regional phone companies have been watching Qwest's VDSL deployment closely but are not sold.

Christopher T. Rice, senior vice president for network planning and engineering at SBC Communications Inc., said his company has decided that pulling fiber all the way to the home is more cost efficient in the long run. But he said extensive stringing of fiber is at least 10 years away.

The former Bells say that any expansion of broadband capability is expensive and will be made based on cold calculations of demand for faster service and how quickly the investment will pay off.

In this challenging economic environment, they argue, every cost, including requirements to lease networks to competitors, must be factored in. They add that in places where their network facilities are so old that they need to be replaced, they are investing to make them capable of handling fiber.

Phone executives point out that even if they could flip a switch today and offer higher speeds to current DSL users, they would have to increase the cost to subscribers to cover the expense of using larger portions of the Internet "backbone," the central pipes that crisscross the country.

And consumers have yet to demonstrate a strong desire for higher speeds. Residential DSL and equivalent service provided over cable television lines rarely provide speeds over 1 megabit per second. And while such service is gaining traction with consumers, at \$40 to \$50 per month, only 13 percent of households have it.

"We're really focused on our existing DSL products to meet what customers are looking for now," said Peter Castleton, executive director of broadband products for Verizon.

Qwest offers its residential VDSL customers only two speeds, neither of which exceeds what is possible on DSL. Company officials said they are evaluating whether to extend VDSL to more neighborhoods.

Even Grande Communications in Texas, one of a handful of small companies that have strung fiber to residential areas, offers customers a top speed of 2.5 megabits per second, with slower speeds at lower prices.

State regulators, who set certain rules and rates and who oppose changes to the FCC's rules, worry that the former Bells are executing a well-honed strategy: Promise dazzling broadband networks in exchange for regulatory relief, then pull back.

In Pennsylvania, Bell Atlantic, which later became Verizon, promised state regulators in 1994 that over a 20-year period, it would deliver a broadband network capable of speeds of 45 megabits per second, according to public filings.

State public service commission officials say the company has deployed roughly 22 percent of what should be in operation. The commission is considering sanctions against the company.

In California, public service commissioner Loretta Lynch said that SBC and its predecessor, Pacific Bell, did little to deploy high-speed networks, even when they were economically flush.

The regional phone companies have been careful not to make promises. And some technology companies, desperate for broadband deployment to spur new spending and growth, say they understand the Bells' history with regulators.

Any telecommunications investment now is inherently risky, and the government needs to eliminate barriers to help make it more attractive, they say.

"Our support for this is not based on commitments," said Peter K. Pitsch, a lobbyist for Intel Corp. and an organizer of a coalition of technology companies urging the FCC to make changes -- though not to go as far as the former Bells would like. "It's based on the belief that they are more likely to do it if it's more attractive. . . . And in the longer term, they are going to want to do it. And have to do it."

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